85-63

NO. _____

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IN THE

Supreme Court Of The United States

October Term, 1985

TERRENCE K. BRADY ..... PETITIONER

V.

H. FOSTER PETTIT, individually and as former Mayor of Lexington-Fayette Urban County Government; Sidney Kinkead, Jr., Chairman; Julian A. Jackson, Sr., Member; Wilfred T. Seals, Member; Walter Leet, Jr., Member; Wanda V. Cranfill, Member; Individually and as Chairman and Members of Lexington-Fayette Urban County Government Civil Service Commission ..... RESPONDENTS

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDIX

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QUESTIONS PRESENTED

1. Should the decision of *Wilson* v. *Garcia*, 471 U.S. _____ (decided April 17, 1985), which, without precedential warning, designated the state statute of limitations for an action for personal injuries as determinative of when all §1983 actions are time barred, be denied retrospective application to all §1983 actions which accrued, or were filed, prior to April 17, 1985?

2. Should the holding of *Wilson* v. *Garcia* be confined to its facts?

3. If either Question 1 or 2 is answered "yes," should the statute of limitations applicable to Petitioner's §1983 action be determined under the "most closely analogous state action" rule of the Sixth Circuit which obtained prior to April 17, 1985?

4. If Question 3 is answered "yes," is an action for breach of a written contract, the most closely analogous state action to the §1983 action of a municipal civil service employee, discharged for "misconduct" for exercising federally protected speech, where his employment relationship with the municipality was under an inviolable contract set out in the written ordinances of the municipality?

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OPINION BELOW

On March 4, 1985, the U.S. Court of Appeals for the Sixth Circuit rendered its unreported Opinion, affirming the trial court which had dismissed Petitioner's action under 42 U.S.C. §1983 as being time barred and appears as Appendix A hereto. The U.S. District Court for the Eastern District of Kentucky rendered its unreported MEMORANDUM OPINION AND ORDER and entered its JUDGMENT thereon on February 13, 1984, and appear as Appendix B-1 and B-2 hereto, respectively. On April 17, 1985, the U.S. Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing, and suggestion for rehearing *en banc*, and appears as Appendix C hereto.

JURISDICTION

The Order of the Court of Appeals for the Sixth Circuit affirming the trial court's dismissal of Petitioner's action as being time barred was entered and filed on March 4, 1985. Petitioner's timely Petition for Rehearing and suggestion for rehearing *en banc* was denied by Order filed April 17, 1985. This Court's jurisdiction is invoked under the provisions of Title 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

CONSTITUTIONAL PROVISIONS

The Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> "... nor shall any state deprive any person of ... property, without due process of law ...."

The First Amendment to the U.S. Constitution provides, in pertinent part:

> "Congress shall make no law ... abridging the freedom of speech ...."

STATUTORY PROVISIONS

42 U.S.C. §1983 provides:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

42 U.S.C. §1988 provides, in pertinent part:

"The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this Title, and of Title 'CIVIL RIGHTS,' . . . for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies . . . the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil . . . cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . ."

Kentucky Revised Statutes (KRS) 413.090(2) provides, in pertinent part:

". . . the following actions shall be commenced within fifteen (15) years after the cause of action first accrued:

. . .

"(2) An action upon a . . . written contract."

KRS 413.120(7) provides, in pertinent part:

"The following actions shall be commenced within five (5) years after the cause of action accrued:

. . .

"(7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated."

KRS 413.140(1)(a) provides, in pertinent part:

"The following actions shall be commenced within one (1) year after the cause of action accrued:

"(a) An action for an injury to the person of the plaintiff . . . ."

STATEMENT OF THE CASE

Petitioner, Terrence K. Brady ("Brady"), was the Director of Personnel of the Lexington-Fayette Urban County Government ("Government"), a municipality of the Commonwealth of Kentucky in September, 1974. The position of Director of Personnel was protected by the Civil Service System of the Government. All rights of persons, including Brady, protected by the local Civil Service System are set out in writing in the ordinances of the Government.[1]

---

[1]The comprehensive plan for the classified Civil Service System of the Lexington-Fayette Urban County Government is set out in §§21-1 through 21-51 of the Code of Ordinances of the Government. It is unnecessary to set out the ordinances verbatim since the Respondents raised the issue of limitations by Motion under Fed.R.Civ.P. 12(b)(6), thereby admitting Petitioner's allegations that he had a property right to his position as Director of Personnel under the Government's ordinances.

On September 19, 1974, and again on September 24, 1974, Brady was interviewed by a news reporter for the *Lexington Leader,* a newspaper of general circulation in Lexington, Kentucky. During those interviews Brady disclosed matters of public concern, involving abuses and attempted abuses of the Civil Service System by the Respondent, H. Foster Pettit ("Pettit"), then Mayor of the Government.

On October 17, 1974, Pettit filed written charges against Brady, charging that the statements of Brady constituted "misconduct," one of only four grounds which would support dismissal of a civil service employee, ("inefficiency", "insubordination", and "violation of law involving moral turpitude" being the other three.)

Pettit's charges, (set out verbatim in Brady's complaint), precipitated a hearing with respect to the dismissal of Brady before the Lexington-Fayette Urban County Government Civil Service Commission ("Commission"), the members of which are Respondents in this action. After a hearing of Pettit's charges, the Commission found that Brady's statements constituted "misconduct" and fixed his punishment at "Discharge" from his employment effective December 31, 1974. None of Brady's statements were found to be false.

On October 3, 1983, Brady commenced this action in the United States District Court for the Eastern District of Kentucky, at Lexington, under 42 U.S.C.

§1983, [jurisdiction of such actions being conferred on the Court by 28 U.S.C. §1343 (3) and (4)], alleging that he had a property right in and to his position as Director of Personnel under the written ordinances of the Government (and statutes of Kentucky). Under Kentucky law, civil service employees have an "inviolable contract" subject to be terminated only as prescribed by the ordinances creating the system. *Elliott* v. *City of Covington*, 202 S.W.2d 621 (1947); *City of Owensboro* v. *Board of Trustees*, 190 S.W.2d 1005 (1945). He contended that the making of such statements could not be deemed "misconduct" as would authorize termination of his employment under the Civil Service System.

Thereupon, Respondents moved to dismiss Brady's action, as being time barred by KRS 413.120 (7), which requires that "(a)n action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated" be commenced within five (5) years after the cause of action accrued.

The rule of the Sixth Circuit which obtained at the time Brady commenced his action with respect to determining the applicable statute of limitations for §1983 actions was the "most closely analogous state action" rule, that is, the limitations statute governing the most factually similar common law action, governed §1983 actions. See *Kilgore* v. *City of Mansfield*, 679 F.2d 632 (6th Cir., 1982); *Carmicle* v. *Weddle*, 555 F.2d 554 (6th Cir., 1977).

Brady responded to Respondents' motion by contending that his §1983 action (claiming deprivation of property by denial of substantive due process) was most closely analogous to an action for breach of a written contract, and thus KRS 413.090(2), which allows fifteen (15) years within which to commence "(a)n action upon a . . . written contract" after the action first accrued, citing *Mills* v. *McGaffee*, Ky., 254 S.W.2d 716 (1953).

Neither the trial court nor the Court of Appeals applied the "most closely analogous state action" rule. Characterizing Brady's action, erroneously, as one for vindication of First Amendment speech rights rather than one for damages for impermissible deprivation of property under the Fourteenth Amendment, neither lower court undertook to analogize Brady's action to *any* factually similar state common law action. Brady contended that termination of his civil service employment on impermissible grounds denied him substantive due process in depriving him of his property right in his employment under the written ordinances pertaining to the Civil Service System. He sought the damages which would be recoverable in an action for breach of a written contract of employment. Declining to analogize Brady's §1983 action to any state common law action, the Court of Appeals held that the 5-year statute contended for by Respondents applied.

On April 17, 1985, the same day that this Court decided *Wilson* v. *Garcia*, 471 U.S. _____ (1985), the Court of Appeals denied Brady's timely filed Petition for Rehearing and suggestion for rehearing *en banc*. *Garcia* enunciated a rule for determining the applicable statute of limitations for §1983 actions which did not obtain in the Sixth Circuit, nor in any of the Circuit Courts of Appeals, as the analysis of the circuits in *Garcia* v. *Wilson*, 731 F.2d 640 (10th Cir., 1984), reveals.

Wilson v. *Garcia*, supra, holds that the state statute of limitations where the §1983 action arose, which governs claims of personal injuries, is the applicable statute of limitation for *all* §1983 actions. KRS 413.140(1)(a), Kentucky's statute of limitation pertaining to personal injury actions, requires that the action be filed within one (1) year of the date that the action accrued. For the reasons stated below, this court ought to grant this Petition, decline to give *Wilson* v. *Garcia* retrospective application, or in the alternative limit it to its facts, apply the "most closely analogous state action" rule to this action and hold that Kentucky's fifteen (15) year statute of limitation, applicable to actions on written contracts, applies to Brady's §1983 action.

REASONS FOR GRANTING THE WRIT

1. BY DENYING THE RULE OF *WILSON* V. *GARCIA* RETROSPECTIVE EFFECT, SUBSTANTIAL HARM

TO §1983 CLAIMS WHICH ACCRUED OR WERE FILED PRIOR TO APRIL 17, 1985, WOULD BE AVOIDED, AND THE BURDEN OF THE ADMINISTRATION OF JUSTICE WOULD BE GREATLY REDUCED.

As long ago as *O'Sullivan* v. *Felix*, 233 U.S. 318 (1914), federal courts have borrowed the state statute of limitations most closely analogous to the §1983 action for determining if the federal claim is time barred. As recently as *Board of Regents* v. *Tomanio*, 446 U.S. 478 (1980) that approach was re-enunciated.

Wilson v. *Garcia*, supra, represents a substantial departure from holdings of this Court which guided federal courts in their approach when determining the appropriate statute of limitations for claims under §1983. The analysis by the Tenth Circuit Court in *Garcia* v. *Wilson*, supra, discloses that the rule of this Court in *Wilson* v. *Garcia*, supra, was followed in none of the Eleven Circuits, nor the D.C. Circuit.

Unquestionably, there are innumerable §1983 claims, yet unfiled, where attorneys, believing that there was sufficient time to file their actions under the authorities of their respective circuits, have seen their clients' §1983 claims, apparently, become instantly time barred by the stroke of the judicial pen on April 17, 1985.

Trial courts are probably now being inundated with motions to dismiss §1983 claims, which were filed beyond the time of the applicable state statute of

limitations for personal injury actions, but short of the time within which the action could have been filed under the previous rule of the circuit.

Attorneys for plaintiffs with §1983 claims which accrued before April 17, 1985, now barred by the state's personal injury statute, though not barred by the statute determinative under their circuit's prior rule, will likely file their actions, anticipating the need to argue that *Wilson* v. *Garcia* ought not be applied retrospectively. Inconsistent rulings by lower courts on these motions are as certain as are appeals therefrom by aggrieved litigants. The expenditure of much legal and judicial industry, time and cost will be avoided by determining, upon granting this Petition, that *Wilson* v. *Garcia* is without retrospective effect.

In *Wilson* v. *Iseminger*, 185 U.S. 55 (1902), it was held that it is essential that a statute of limitations allow a reasonable time after it takes effect for the commencement of suits upon existing causes of actions, and that if it were otherwise the statute would be but an unlawful attempt to extinguish rights arbitrarily. See also *Block* v. *North Dakota*, 461 U.S. 273 (1983); *Texaco, Inc.* v. *Short*, 454 U.S. 516 (1982).

The statute of limitation for §1983 actions judicially created on April 17, 1985, differs in no respect from a legislatively created one, and the above rule ought to be just as applicable. The *Garcia* rule was abrupt and unforseeable. No prior opinion of this Court foretold its coming. The rule that a reasonable

time ought to be allowed before a statute of limitations takes effect would be honored, if this Court granted this Petition to deny *Garcia* any retroactive effect upon §1983 claims which accrued prior to April 17, 1985.

2. ***WILSON* V. *GARCIA* DECIDED MORE THAN WAS REQUIRED TO DECIDE THE MERITS AND OUGHT TO BE LIMITED TO ITS FACTS TO AVOID DISPARATE RESULTS AMONG THE STATES AND DISRUPTION IN THE ADMINISTRATION OF §1983 CLAIMS FILED OR ACCRUING PRIOR TO APRIL 17, 1985.**

In *Garcia*, the §1983 claim was founded upon a claimed unlawful arrest and brutal beating by a state police officer. Three state statutes of limitation were potentially analogous: a 3-year statute for personal injury actions, a 2-year statute for tort actions against public employees and a 4-year residuary statute for all actions not otherwise provided for. This Court reasoned that the latter two statutes were inappropriate and held that New Mexico's 3-year statute for personal injury actions applied. As clearly being a §1983 action, factually similar to a civil action for personal injury, the "most closely analogous state action" rule of *Tomanio* would have been adequate to decide *Garcia*. However, the court reached a conclusion, unnecessary to a decision in *Garcia*, that is, that *all* §1983 claims are best characterized as personal injury actions.

While done in the name of uniformity of approach, *Garcia* certainly does not achieve uniformity of *result*. Using the states comprising the Sixth Circuit as examples, a §1983 claim arising in Michigan would be time barred, three (3) years after it accrued [see M.C.L.A. 600.5805(8)], while a §1983 action arising in Ohio would be barred two (2) years after it accrued [see O.R.C. §2305.10]. In Kentucky [K.R.S. 413.140(1)(a)] and in Tennessee [T.C.A. 28-3-104], under *Garcia*, a §1983 action must be filed within one (1) year after it accrued. There is a certain amount of irrationality in the fact that *Garcia* would grant a citizen, unlawfully arrested by a police officer in Detroit, three (3) years within which to bring his action, while a professor discharged from the University of Tennessee for constitutionally impermissable reasons, would have but one (1) year within which to bring suit.

State legislatures, generally prescribe shorter times within which personal injury actions must be brought. However, statutes pertaining to actions involving other personal *rights* are generally of a longer duration. Difficulty, or ease, in marshalling or preserving evidence, and the necessity, or the absence of need, for eyewitnesses are among the major factors considered in determining the appropriate length of statutes of limitations.

Nothing in §1988 (or §1983) evidences any Congressional policy of time barring §1983 claims *at all*, much less, shortly after they accrue. Since Congress

has not legislatively confronted this Court's previously enunciated "most closely analogous state action" rule, it has evidenced satisfaction with it.

The actual §1983 claim in *Garcia* was most closely analogous to an action for personal injury, and this Court could have decided *Garcia* by merely so holding. It was not necessary to its decision to encompass *all* §1983 actions under one characterization. By having gone further than necessary to decide Garcia, this Court ought to grant this Petition and confine *Garcia's* holding to its facts.

3. IF *GARCIA* IS NOT TO BE CONFINED TO ITS FACTS, BUT IS DENIED RETROSPECTIVE EFFECT, THIS COURT OUGHT TO APPLY THE RULE OF THE CIRCUIT WHEREIN THE §1983 CLAIM AROSE WHEN DETERMINING WHETHER A CLAIM WHICH AROSE PRIOR TO APRIL 17, 1985, IS TIME BARRED.

As mentioned, the Constitution requires that a reasonable time be allowed after a statute of limitations takes effect for the commencement of suits upon existing claims. It is essential that lower courts, adjudicating such accrued and pending claims, have some rule of law other than that enunciated in *Garcia* to guide them in the interim. Already in place are the varied approaches of the various circuits which would be available during the transition period.

In any event, this Court ought to grant this Petition for the purpose of determining (if *Garcia* is to be denied retroactive effect) whether the rule which ob-

tained in the respective circuits ought to apply during the interim or whether some other rule for determining whether an action which accrued prior to April 17, 1985, is time barred, ought to be fashioned.

4. **SINCE THE LOWER COURT HAS RENDERED A DECISION ON A FEDERAL QUESTION IN CONFLICT WITH THIS COURT'S, THEN, APPLICABLE DECISIONS, AND THAT OF AT LEAST THREE OTHER CIRCUITS, THIS COURT OUGHT TO GRANT THIS PETITION.**

When the courts below decided the merits of Brady's appeal, it declined to follow this Court's, then applicable decisions, exemplified by *Tomanio*, supra, as well as its own decision in *Hines* v. *Board of Education*, 492 F.Supp. 469 (E.D., Ky., 1980), *aff'd*, 667 F.2d 564 (6th Cir., 1982). This Court in *Tomanio* (with exception of *Garcia*) and the Sixth Circuit (with the exception of this case) applied the "most closely analogous state action" rule. The Sixth Circuit characterized Brady's action as one to protect his First Amendments speech rights. No state common law action is analogous to such an action, and the Sixth Circuit declined to particularize one.

Under Kentucky law, civil service employment is an inviolable contract subject to be terminated only as prescribed by the ordinance creating the system. *Elliott*, supra; *City of Owensboro*, supra. "Principles of contract law naturally serve as useful guides in

determining whether or not a constitutionally protected property interest exist." *Jago* v. *Van Curen*, 454 U.S. 14, 18 (1981).

The interest which Brady's §1983 claim sought to protect was his property right in his employment, not his right to speak.

Northeast Georgia Radiological Associates v. *Tidwell*, 670 F.2d 507 (5th Cir., 1982) held in a §1983 action, that a radiologist's continuous employment contract with a city hospital, terminable only for cause, was a property interest protected by the Fourteenth Amendment.

Vail v. *Board of Education*, 706 F.2d 1435, (7th Cir., 1983), a §1983 action, held that a football coach, who had a 2-year employment promise of the school board, was impermissibly deprived of a legitimate expectation of continued employment when his contract was not renewed for the second year.

Liotta v. *National Forge Company*, 629 F.2d 903, (3rd Cir., 1980), *cert. den'd*, 451 U.S. 970 (1981), held, in a federal civil rights action that Pennsylvania's statute of limitation for contracts applied, where Plaintiff's employment under a written contract was terminated for espousing rights of the company's black employees. Brady's property interest in his employment can only be determined by an examination of the written ordinance which created it. *Bishop* v. *Wood*, 426 U.S. 341 (1976). Discharge from any

form of public employment for exercising protected speech is never permissible. *Pickering* v. *Board of Education*, 391 U.S. 563 (1968).

Had the lower courts undertaken to analogize Brady's claim to a factually similar state common law action, any analogy would have been incomplete which did not include the fact that Brady's contract rights were in writing.

As having declined to follow *Tomanio* or adhere to former decisions of its own, and having decided the federal question of the appropriate limitation for Brady's claim in conflict with at least, three circuits, this Court ought to grant this Petition.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should issue to review the Order of the United States Court of Appeals for the Sixth Circuit, affirming the dismissal of Petitioner's §1983 action as being time barred.

Respectfully submitted,

William C. Jacobs
173 North Limestone Street
Lexington, Kentucky 40507
(606) 255-2[illegible]4

Counsel for Petitioner

CERTIFICATE OF SERVICE AND ENTRY OF APPEARANCE

William C. Jacobs hereby certifies that this Petition for Writ of Certiorari was served on the Respondents by mailing three (3) copies of same, first class postage pre-paid, to their attorney of record, Hon. Theresa L. Holmes, Lexington-Fayette Urban County Government, Department of Law, 200 East Main Street, Lexington, Kentucky, 40507, on this the 12 day of July, 1985. Service upon counsel for the Respondents constitutes service upon all parties required to be served. Supreme Court Rules 28.3, 28.5(b), 19.3.

William C. Jacobs hereby enters an appearance on behalf of the Petitioner, Terrence K. Brady. Supreme Court Rule 19.3.

William C. Jacobs

APPENDIX

APPENDIX A

NOT RECOMMENDED FOR FULL TEXT PUBLICATION

FILED
MAR 4 1985
JOHN P. HEHMAN, Clerk

No. 84-5198

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

TERRENCE K. BRADY,
Plaintiff-Appellant,

v.

H. FOSTER PETTIT, individually and as former Mayor of Lexington-Fayette Urban Co. Govt.; SIDNEY KINKEAD, JR., Chairman; JULIAN A. JACKSON, SR., Member; WILFRED T. SEALS, Member; WALTER LEET, JR., Member; WANDA V. CRANFILL, Member; Individually and Chairman and Members of Lexington-Fayette Urban Co. Government Civil Service Commission,
Defendants-Appellee.

ON APPEAL FOR THE UNITED STATES DISTRICT COURT FOR EASTERN DISTRICT OF KENTUCKY

BEFORE: **JONES** and **KRUPANSKY**, Circuit Judges; and **BROWN**, Senior Circuit Judge.

Per Curiam. This case presents the question of whether an action under 42 U.S.C. § 1983 for damages arising from the discharge of a Kentucky civil service employee because of the exercise of his First Amendment rights is more analogous to an action for breach of a written contract or to an "action for an injury to the rights of plaintiff not arising on contract and not otherwise enumerated?" We hold that the latter analogy is closer under the facts of this case and affirm the judgment of the district court.

Plaintiff, Terrence K. Brady, filed his complaint on October 3, 1983 against the mayor and the members of the Civil Service Commission of the Lexington-Fayette Urban County Government. He alleged that nine years earlier he had been wrongfully discharged from his position as Director of Personnel of Lexington-Fayette Urban County Government because of the exercise of his First Amendment right to free speech. He alleged that under the laws of Kentucky he had a property right in his former position. Brady alleged that the making of the statements in question had not constituted "misconduct" so as to authorize his termination.

The defendants filed a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). The defen-

dants alleged that the action was barred because the statute of limitations had run. The district court agreed and dismissed the action.

Because there is no federal statute of limitations governing actions brought under 42 U.S.C. § 1983, the district court must look to "the statute of limitations of the state where it sits which would be applicable to the most closely analogous state action to determine the time within which the cause of action must be commenced." *Mason* v. *Owens-Illinois, Inc.*, 517 F.2d 520, 521 (6th Cir. 1975). The defendants contend that because Brady seeks redress for an alleged violation of his right to free speech, the most analogous Kentucky statute of limitation is found in Ky. Rev. Stat. § 413.120(7), which states:

> The following actions should be commenced within five years after the cause of action accrued:
>
> . . .
>
> (7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated.

Brady argues that his suit is more analogous to an action on a written contract, and, therefore, is governed by the fifteen-year statute of limitations set forth in Ky. Rev. Stat. § 413.090(2), which provides:

> . . . the following actions shall be commenced within fifteen years after the cause of action first accrued:

. . .

(2) An action upon a . . . written contract.

In deciding this issue, we must look to "the interest . . . sought to be protected, and the operative facts comprising the claim." *Hines* v. *Board of Education*, 492 F. Supp. 469, 472 (E.D. Ky. 1980), *aff'd*, 667 F.2d 564 (6th Cir. 1982). The interest Brady is seeking to protect is his First Amendment right to free speech. To prevail in his section 1983 action, Brady would only have to show that he had been fired for engaging in protected activity. Whether he had a contractual interest in his job would be irrelevant to that claim. Therefore, the most closely analogous statute of limitations is Ky. Rev. Stat. § 413.120(7).

Accordingly, the judgment of the district court is **AFFIRMED.**

ISSUED AS MANDATE: APRIL 25, 1985

COSTS: NONE

A TRUE COPY
Attest:
JOHN P. HEHMAN, Clerk
By /s/ N. Schulkens
Deputy Clerk

* * * * * * *

APPENDIX B-1

FILED FEB 13 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CIVIL ACTION NO. 83-309

TERRENCE K. BRADY PLAINTIFF

VS. **MEMORANDUM OPINION AND ORDER**

H. FOSTER PETTIT, ET AL. DEFENDANTS

* * * * * * * * *

This action is now before the Court on the motion of all defendants to dismiss the complaint as barred by the statute of limitations. Plaintiff, formerly the director of personnel for the Lexington-Fayette Urban County Government, brings this action under 42 U.S.C. §1983 against the former Mayor and Commissioners of said government. The defendants terminated plaintiff's employment, effective December 31, 1974, allegedly in retaliation for making public statements critical of the then-Mayor, defendant Pettit. The complaint, filed October 3, 1983, alleges no actions by defendants subsequent to December 31, 1974.

Because Congress failed to specify a limitations period for actions brought under 42 U.S.C. §1983, the

Court must look to state law for the appropriate limitations period. *Carmicle* v. *Weddle*, 555 F.2d 554 (6th Cir. 1977); *Garner* v. *Stephens*, 460 F.2d 1144 (6th Cir. 1972). The court must examine the allegations of the complaint and apply "the statute of limitations of the state where it sits which would be applicable to the most clearly analogous state action . . ." *Mason* v. *Owens-Illinois, Inc.*, 517 F.2d 520, 521 (6th Cir. 1975).

Defendants contend that since plaintiff seeks redress for an alleged violation of his right to free speech provided under the First Amendment to the U.S. Constitution, the most analogous Kentucky statute of limitation is found in K.R.S. 413.120(7), which reads as follows:

> The following actions shall be commenced within five years (5) years after the cause of action accrued:
>
> . . .
>
> (7) An action for an injury to the rights of the plaintiff, not arising on contract and not otherwise enumerated; . . .

Since the last violation of plaintiff's rights alleged in the complaint occurred on December 31, 1974, and since the complaint was filed on October 3, 1983, defendants concluded that this action must be dismissed as untimely filed.

Plaintiff does not dispute that his action is barred if it can best be characterized as seeking redress for

violation of his First Amendment rights to free speech. Instead, he argues that his suit is more analogous to an action on a written contract, which is governed by the fifteen-year statute of limitations set forth in K.R.S. 413.090(2). Briefly stated, plaintiff's theory is that his written employment contract permitted termination only for "misconduct" and that the actions upon which his termination was based were not "misconduct" but were instead "an exercise by plaintiff of his federally protected right of free speech under the 1st Amendment to the U.S. Constitution." Plaintiff's response brief at 4. For this reason, plaintiff contends his claim is most analogous to a claim based on a written contract.

The Court must reject this ingenious argument. The right plaintiff seeks to vindicate is the right to speak freely on matters of public concern without fear of retaliatory state action. The source of this right is the U.S. Constitution, not the written contract of employment with the Lexington-Fayette Urban County Government. At trial, plaintiff would merely have to show that he engaged in protected First Amendment activity and was fired for doing so. The complaint does not allege that such action violated his written employment contract; plaintiff would not be required to prove that it did in order to prevail on the merits.

It is clear from the foregoing that plaintiff's action is most analogous to "an action for an injury to

the rights of the plaintiff not arising on contract and not otherwise enumerated." The action is, therefore, barred as untimely by the five-year statute of limitations set forth in K.R.S. 413.120(7).

IT IS NOW THEREFORE ORDERED HEREIN that the motion of defendants to dismiss the complaint be GRANTED.

This the 13th day of February 1984.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

A True Copy Attest
Leslie G. Whitmer, Clerk
U.S. District Court
By: /s/ Hilda F. Watkins
D.C.

* * * * * * *

APPENDIX B-2

FILED FEB 13 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY

LEXINGTON

CIVIL ACTION NO. 83-309

TERRENCE K. BRADY PLAINTIFF

VS. **JUDGMENT**

H. FOSTER PETTIT, ET AL. DEFENDANTS

* * * * * * * * *

In conformity with the Memorandum Opinion and Order this day entered herein, IT IS NOW ORDERED AND ADJUDGED that this action be DISMISSED and STRICKEN from the docket of this Court.

This the 13th day of February 1984.

/s/ Scott Reed
SCOTT REED, JUDGE
UNITED STATES DISTRICT COURT

A True Copy Attest
Leslie G. Whitmer, Clerk
U.S. District Court
By: /s/ Hilda F. Watkins
D.C.

NOTICE IS HEREBY GIVEN OF THE
ENTRY OF THIS ORDER OR JUDGMENT
ON February 13, 1984
LESLIE G. WHITMER, CLERK
BY: /s/ Hilda F. Watkins D.C.

* * * * * * *

APPENDIX C

FILED
APR 17 1985
JOHN P. HEHMAN, Clerk

No. 84-5198

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TERRENCE K. BRADY,
Plaintiff-Appellant,

v.

H. FOSTER PETTIT, ETC., ET AL.,
Defendants-Appellees

O R D E R

BEFORE: JONES and KRUPANSKY, Circuit Judges, and BROWN, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the

petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
/s/ John Hehman
John P. Hehman, Clerk

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